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THE POWERS OF CORPORATIONS CREATED BY ACT OF CONGRESS

THE Supreme Court of the United States has decided that the Federal Reserve Board may give national banks permission to engage in the business of acting as trustees and as executors and administrators and as registrars of stocks and bonds.¹

This suggests the question whether there has been any modification of the doctrine of *M'Culloch v. Maryland*² and *Osborn v. Bank of the United States*,³ and what are the scope and extent of the powers that may be exercised by corporations created by act of Congress.

The creation and control of corporations by federal statute has been suggested as a remedy for the evils arising out of the diversity and feebleness of state control over companies engaged in transportation or commercial business of nation-wide concern, and it has even been urged that existing state corporations should be required to accept incorporation under federal laws as a condition of being allowed to engage in commerce with foreign nations and among the states. With the growth of national consciousness little need is felt of drawing very technically the lines between the spheres of state and federal legislation, and the present tendency is to ignore these distinctions and to consider rather the question of practical efficiency. It is important, therefore, that we should keep in mind the limitations which the Constitution has put upon the purposes for which Congress may create corporations and the powers with which corporations so created may be endowed. A corporation is something more than the personification of an association of individuals; its personality, its properties and powers are derived from the laws of the sovereignty by which it was authorized, or at least recognized, to be a legal person. It is not enough that an association of individuals has filed a certificate in a public office declaring itself to be a corporation and stating the objects and

¹ First National Bank *v.* Union Trust Co., 244 U. S. 416 (1917), reversing the judgment of the supreme court of Michigan in 192 Mich. 640, 159 N. W. 335 (1916), and overruling the decision of the Supreme Court of Illinois in *People v. Brady*, 271 Ill. 100, 110 N. E. 864 (1915).

² 4 Wheat. (U. S.) 316 (1819).

³ 9 Wheat. (U. S.) 738 (1824).

purposes for which it was organized. The legal existence of the corporation and its powers depend upon the jurisdiction of the state which created it or the recognition of the state wherein it operates. The principles governing the power of Congress to create corporations and the extent of the power conferred are stated by Chief Justice Marshall in the cases of the first and second banks of the United States.

The power to create corporations is not one of the substantive powers conferred upon Congress by the Constitution. "Among the enumerated powers," says Chief Justice Marshall in *M'Culloch v. Maryland*⁴ "we do not find that of establishing a bank or creating a corporation." He was discussing the question whether this power, admitted to be a power appertaining to sovereignty, was one which appertained to the sovereignty of the state or to that of the United States, and he said:

"The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished."⁵

It was decided in that case that the creation of a bank with the power to transact private banking business was an appropriate means for carrying into execution the powers expressly given to the government of the United States, and the creation of such a corporation was held to be justified by the authority given to make "all laws necessary and proper for carrying into execution the enumerated powers and all other powers vested by the Constitution in the government of the United States."

Again, in *Osborn v. Bank of the United States*,⁶ the Chief Justice said:

"Why is it that Congress can incorporate a bank? This question was answered in *M'Culloch v. The State of Maryland*. It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? If it can, if it be as competent

⁴ 4 Wheat. (U. S.) 316, 406 (1819).

⁵ *Ibid.*, 411.

⁶ 9 Wheat. (U. S.) 738, 861 (1824).

to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, the vital part of the corporation: it is its soul; and the right to preserve it originates in the same principle with the right to the skeleton or body which it animates."

These decisions declare the principles upon which rests the power of Congress under the Constitution to create corporations and indicate the extent of the powers that may be conferred upon them. In view of these principles Congress created the national banks under the act of June 3, 1864.⁷ Of this act the Supreme Court said in 1875,⁸

"The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of this court in *M'Culloch v. Maryland* (4 Wheat. 316) and in *Osborn v. Bank of the United States*, (9 id., 708) therefore, applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are a means appropriate to that end. Of the degree of necessity which existed for creating them Congress is the sole judge."

Victor Morawetz, in an article in the HARVARD LAW REVIEW for June, 1913, suggested that although the court was right in sustaining the constitutionality of the national bank act, it seemed little more than a pretense to assert that an unlimited number of banks, some of them small and intended only to give local banking facilities, were incorporated to serve the fiscal operations of the government and that a sounder and better ground was the power to regulate commerce among the states; but it is to be noted that the consolidation of some of these banks under the National Reserve Bank Act has now proved their usefulness for serving the fiscal operations of the government and the transportation of armies in time of war.

When Congress in 1913⁹ conferred on the Federal Reserve Board power to license such national banks as should apply for it,

⁷ 13 STAT. AT L. 99.

⁸ Farmers' & Mechanics' National Bank v. Dearing, 91 U. S. 29-33 (1875).

⁹ 38 STAT. AT L. 262.

power to act as trustees and executors and administrators and registrars of stocks and bonds, it was insisted that these functions bore no real relation to the purpose of serving the fiscal operations of the government or regulating commerce among the states, nor to any of the federal purposes for which Congress had power to authorize corporations to be created; that the functions were not even the proper functions of a private banking business, but were governed by different rules of law peculiarly within the province of the state and that the duties of executors and administrators were derived and regulated wholly through state laws. The question came before the Supreme Court of Michigan in *Grant Fellows, Attorney General v. First National Bank of Bay City*¹⁰ and before the Supreme Court of Illinois in *People ex rel. First National Bank of Joliet v. Brady, Auditor.*¹¹

In both cases the decision was that the permission given by Congress through the Federal Reserve Board to the national banks did not avail to authorize them to carry on the business of trust companies and registrars of stocks and bonds, nor to act as executors and administrators within the states.

The decision of the Supreme Court of Michigan was taken to the Supreme Court of the United States and the judgment was reversed.¹² The effect was to overrule also the opinion of the Supreme Court of Illinois in the Joliet bank case. The opinion of the Supreme Court of the United States was delivered by the Chief Justice. He said the court below, while recognizing that it had been settled beyond dispute that Congress had power to organize banks and endow them with functions both of a public and private character, had,

"instead of testing the existence of the implied power to grant the particular functions in question by considering the bank as created by Congress as an entity, with all the functions and attributes conferred upon it, rested the determination as to such power upon a separation of the particular functions from other attributes and functions of the bank, and ascertained the existence of the implied authority to confer them by considering them as segregated, that is, by disregarding their relation to the bank as component parts of its operation."

¹⁰ 192 Mich. 640, 150 N. W. 335 (1916). ¹¹ 271 Ill. 100, 110 N. E. 864 (1915).

An article of my own on the Illinois case, with an outline of the arguments of counsel and court, appeared in 16 COL. L. REV. 386.

¹² 244 U. S. 416, 424 (1917).

The Chief Justice said that while fully recognizing the right of Congress to exercise its legislative judgment as to the necessity of creating the bank including the scope and character of the public and private powers which should be given to it, the court disregarded this discretion in Congress to determine whether it was relevant or appropriate to give the bank the particular functions in question, and in so doing the court below took a mistaken view of the actual conditions and failed to observe that the state banks exercised these same functions and by reason of this were rivals in the same field of business so that it was plain that it was necessary to confer these functions upon the national banks in order to promote their efficiency and the success of their business. As to the point that the functions of executors and administrators and trustees were peculiarly within the domain of state regulation, the court said that it was established in *M'Culloch v. Maryland* and *Osborn v. Bank of the United States* that

"although a business was of a private nature and subject to state regulation, if it was of such character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank the power to exercise such private business in coöperation with or as part of its public authority."

The Supreme Court took no notice of the suggestion of counsel that Congress had not, in fact, declared its opinion that the new privileges conferred were necessary to the efficiency of the national banks. They only declared that they might be conferred by the Federal Reserve Board on such national banks as applied for them. It is, perhaps, sufficient that Congress should determine that these privileges were necessary to the efficiency of any national bank that should, in view of the rivalry of state banks, find it was desirable that it should take up these new lines of business. It will be observed that in this case of the national banks the court found as an essential fact that the new functions now conferred upon them were functions which had now become familiar functions of state banks, their rivals in the banking business, so that it was a reasonable exercise of discretion for Congress to consider them a relevant and appropriate means of preserving the efficiency of the banks as instrumentalities in carrying into execution the purposes of the government for which they were created.

The question whether the national banks should be authorized to extend their business over these new fields is not perhaps a matter of much moment. The case is important because of its bearing upon the question of the scope and extent of the powers that may be conferred by Congress upon a corporation created by it for the execution of any of the powers given to it by the Constitution. Does it extend the doctrine of *M'Culloch v. Maryland* and *Osborn v. Bank of the United States*? Is it true, as was insisted by Justice Ostrander in the court below, that the decision involves the conclusion that if Congress has lawfully created a corporation in aid of the fiscal operations of the government, it may confer upon it the powers of a trading company or a transportation company, or to go further and to speak more generally, is there anything in this decision that indicates that Congress having created a corporation with such powers as in its judgment make it an appropriate means of executing the powers committed to the federal government, it may incidentally confer upon it powers not essential to its efficiency for those purposes and having no relation to those purposes?

Before considering the arguments that have been urged in favor of the extension of the field of the activities of federal corporations, it may be well to note that for more than a century Congress, except in legislating for the territories and the District of Columbia, has rarely exercised its incidental power to create corporations other than the national banks and the Pacific Railroad companies. Charters were granted to some interstate bridge companies and ferry companies, some canal companies and a few associations of a benevolent or social character of general concern; but the movement now is toward the incorporation by general law of railroad and transportation companies, of large commercial corporations engaged in interstate commerce and even of companies engaged in manufacturing goods intended to be carried in interstate commerce.

There is a chapter in the first edition of "Thompson on Corporations," 1895, entitled "National Corporations" containing an historical sketch in less than three pages. The chapter was written by Russell H. Curtis of the Chicago bar and the article appeared first in 21 AMERICAN LAW REVIEW, 258 (1887). He says that in 1791 Congress incorporated the earliest bank of the United States, the charter of which expired by limitation in 1811. In 1815 a bill

to incorporate a national bank was passed by Congress, but was vetoed by President Madison. In 1816 Congress granted a charter for twenty years to the second bank of the United States, but before the charter expired President Jackson, on September 24, 1833, found a Secretary of the Treasury who would consent to obey his order to withdraw the funds of the United States from the bank. In 1863 Congress passed a statute authorizing the formation of national banks¹³ and the existing National Bank Act was approved June 3, 1864.

In 1862 Congress chartered the Union Pacific Railroad and Telegraph Company,¹⁴ and by the same act granted franchises to certain state railroad companies with provision for their future consolidation, which was effected in part in 1880, and it was held by the Supreme Court in 1883¹⁵ that a suit relating to the validity of the consolidation was a suit arising under the laws of the United States. In 1866 Congress chartered the Atlantic and Pacific Railroad Company to build a line from Missouri to the Pacific coast,¹⁶ and in 1871 a charter was granted to the Texas and Pacific Railroad Company.¹⁷

The Supreme Court in 1884¹⁸ held that these and similar companies were strictly suits arising under the laws of the United States, and this is now the settled law.¹⁹

Justice Bradley, in 1887, speaking of these statutes granting franchises to the Pacific Railroad companies, said:

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws."²⁰

In 1865 Congress incorporated the Freedman's Savings and Trust Company and in 1866 the National Asylum for Disabled Volunteer Soldiers, but both of these were made corporations of the District of Columbia; but the Forty-ninth Congress went further and incorporated the National Trade Union of the District of Columbia, with authority to establish branches in all the states.

¹³ 12 STAT. AT L. 665.

¹⁴ *Ibid.*, 489.

¹⁵ *Ames v. Kansas*, 111 U. S. 449 (1883).

¹⁶ 14 STAT. AT L. 292.

¹⁷ 16 STAT. AT L. 573.

¹⁸ Pacific Railroad Removal Cases, 115 U. S. 1 (1884).

¹⁹ MORAWETZ ON CORPORATIONS, §§ 984, 985.

²⁰ *California v. Pacific R. R. Co.*, 127 U. S. 1, 39 (1887).

In 1871 Congress granted a charter to the Centennial Board of Finance for the national exposition of 1876.

In 1889, for the purpose of regulating commerce with foreign countries and among the states, Congress incorporated the Maritime Canal Company of Nicaragua as a private stock company for profit with authority to construct a canal in foreign territory, and in 1890 the North River Bridge Company was incorporated by Congress with power to build a bridge over the Hudson River between New York and New Jersey, to exercise the right of eminent domain and to sue and be sued in the United States Circuit Court.²¹

The Supreme Court likened the creation of this corporation to the creation of "a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the States."²²

The *Wheeling Bridge Case*,²³ related to the paramount control of Congress over a bridge erected by a state corporation, and in *Stockton v. Baltimore & New York Railway Co.* the authority to construct the bridge had been given by Congress to corporations of New York and New Jersey.

The American Red Cross Society, incorporated in the District of Columbia in 1881 and 1893, was finally reincorporated by act of Congress under government supervision in 1905. The Panama Canal was built by the government. The United States Shipping Board is a commission and its Emergency Fleet Corporations are organized under the laws of the District of Columbia.²⁴ The Federal Reserve Banks are made up of national banks.²⁵

Hitherto Congress has confined the exercise of its power to create corporations pretty strictly to the organization and regulation of national banks and of transcontinental railroads. It has not attempted to require the federal incorporation of existing railroad companies chartered by the states, even though their business within the state of their origin is insignificant, nor has it attempted to insist upon federal incorporation of companies organized for commercial business coextensive with the whole country, still less to incorporate manufacturing companies even though they exercise

²¹ 26 STAT. AT L. 268.

²² *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529 (1894).

²³ 18 How. (U. S.) 421 (1855).

²⁴ 38 STAT. AT L. 251, December 23, 1913.

²⁵ 39 STAT. AT L. 227, June, 1916.

nation-wide competition or threaten to exercise nation-wide monopoly.

The growing sense of national unity and the experience of national efficiency acquired in the war will tend to bring pressure upon Congress to avail itself more freely of its power to create corporations, and the question naturally arises whether corporations engaged in business throughout the whole country should not be created and controlled by national authority and whether this should not apply not only to interstate railroads but also to trading companies and even to companies engaged in the manufacture of goods intended to be sold in interstate and foreign commerce.

In his book on "Social Reform and the Constitution," published in 1911, Professor Frank J. Goodnow, of Johns Hopkins, has a chapter on "Federal Incorporation" prepared under his direction by Mr. Sidney D. Moore Hudson. After examining the opinions of Chief Justice Marshall in *M'Culloch v. Maryland* and *Osborn v. Bank of the United States*, as well as the argument of Secretary Hamilton,²⁶ he considers first, the constitutionality of the erection of federal corporations having power to engage in interstate commerce,—trade as well as transportation, and secondly, whether such corporations may be granted the power to manufacture goods to be sold or transported in interstate commerce. He finds that no question has been made with regard to corporations engaged in transportation by land or water, and as to corporations formed for the purpose of engaging in interstate trade, he says it must be shown that the corporations are such as to have, in fact, a relation to the regulation of interstate commerce sufficiently close to indicate that such regulation may reasonably be regarded as the purposes of Congress in the erection of the corporation. And the suggestion is that if a railroad or a bridge company may be organized as an instrumentality of interstate commerce why may not companies be erected in order to provide a more efficient organization for carrying it on. He goes further and includes the manufacture of goods in the purposes for which federal corporations may be organized by act of Congress, provided it is found in the judgment of Congress that the manufacture of goods to be transported or sold in interstate commerce is essential to rendering

²⁶ 4 Wheat. (U. S.) 316 (1819), 9 Wheat. (U. S.) 738 (1824); 3 HAMILTON'S WORKS, Federal Ed. 448.

the corporation completely efficient for the purposes for which the government has created it. He accepts the distinction made in *Kidd v. Pearson* between manufacture and commerce,²⁷ but submits "That this principle does not render unconstitutional the conferring of the power to manufacture upon federal corporations engaged in interstate or foreign commerce." He refers to the Danbury Hatters' case²⁸ as affirming the rights under certain conditions of direct federal control over manufacture.

The need of federal incorporation was urged by President Taft in his special message to Congress on January 7, 1910, pages 17-20, and H. L. Wilgus, writing on the question, "Should there be a federal incorporation law?" insisted that "the jurisdiction which can create corporations should be confined exclusively to that one which will have responsibility for their actions in every place." Some five years ago Victor Morawetz wrote in this REVIEW a comprehensive article entitled "The Power of Congress to Enact Incorporation Laws and to Regulate Corporations."²⁹ He referred to the bank cases and the bridge cases and quoted Hamilton's opinion on the charter of the first bank of the United States to the effect that the creation of a corporation was but a mean having a natural relation to any of the acknowledged objects or lawful ends of the government; it is not an independent, substantive thing, but a quality, capacity or mean to an end. A mercantile company is formed for the purpose of carrying on a particular branch of business, and to add incorporation to this would only be to add artificial capacity for prosecuting the business with more safety and convenience.³⁰

Mr. Morawetz discussed the question how far national corporations would be peculiarly subject to national legislation and how they would be affected by state laws, and also the questions of taxation by the states and national control and regulation of state corporations, and suggested that any attempt on the part of Congress to control or regulate state corporations by means of the imposition of prohibitory excise taxes should not be encouraged.

The federal incorporation of railway companies was the subject of an article in the HARVARD LAW REVIEW by Charles W. Bunn, of Minnesota, in April, 1917. He refers to *Railroad Co. v. Mary-*

²⁷ 128 U. S. 1 (1888).

²⁸ *Loewe v. Lawlor*, 208 U. S. 274 (1908).

²⁹ June, 1913.

³⁰ Ford's Edition of the Federalist, p. 657.

land,³¹ in which Justice Bradley referred to the exercise of the power of Congress over interstate commerce in the construction of the Cumberland national road and similar works and the more recent exercise of that power, though mostly through national territory, in the establishment of railroad communication with the Pacific coast. He quoted the Minnesota Rate cases, followed in *Houston, East & West Texas Railway Co. v. United States*,³² and concludes (page 594):

"It has, therefore, been determined that Congress, under its power to regulate commerce, may itself build railways or provide for government railways by delegation of power to corporations. The government may also provide for transportation of its mails, its armies, and its property by any means it chooses to select. Under these ample powers it may provide its own instrumentalities of transportation, or may make use of existing instrumentalities."

During the last three months there has been a series of articles in the MICHIGAN LAW REVIEW by Professor Myron W. Watkins, of the University of Missouri.³³ He examines in detail the decisions of the Supreme Court in the cases of the banks of the United States and the national banks, the Pacific Railroad cases, the bridge cases, the ferry cases, the cases on the incorporation and regulation of telegraph companies and express companies, and the cases on the regulation of rates and of the operation of the instruments or instrumentalities of interstate commerce, and the jurisdiction over questions of liability to employees and to the public, and upon the effect of the federal statutes upon monopolies and restraint of trade. Referring to the laxity and diversity of the regulation of corporations created by the various states, he examines the question whether compulsory federal incorporation of all corporations engaged in interstate commerce is not a constitutional remedy, and the conclusion on this last point is that the enactment of a national incorporation law, if

"backed by a fair proportion of the business community (and there seems every reason to believe that it would even now have the support of a representative group of men in business and professional life), and if Congress by its first action evidences a disposition to promote the

³¹ 21 Wall. (U. S.) 456 (1874).

³² 234 U. S. 342 (1914).

³³ "Federal Incorporation," 17 MICH. L. REV. 64, 145, 238, November and December, 1918, and January, 1919.

interstate trade, rather than to harry and retard it, the Supreme Court would be diligent to find its way clear to uphold it.”³⁴

After examining the bank cases and the Pacific Railroad cases, he says:

“We may conclude that the following principles are confirmed or established by these western railroad cases: first, Congress may charter corporations for certain purposes; second; Congress may create railroad corporations to engage in interstate transportation, *i. e.* corporations endowed with a public interest, but organized and conducted by private parties strictly for profit; third, it is a sufficient basis for the exercise of this power that in the judgment of Congress the erection of such corporations will ‘tend to facilitate’ interstate commerce. It is not for the courts to decide upon the expediency of employing this means of ‘facilitating commerce’ — that is left to the discretion of Congress.”³⁵

In these articles the power of Congress to create corporations and the extent of the power conferred has been discussed in connection with an examination of the cases on the power of Congress to regulate interstate and foreign commerce; and it is this power which opens up the most important and the most indefinite field for the creation and operation of federal corporations. It is in this direction that the extension of the power of the federal government is compelled by the expansive force of the commercial instinct in a people which realizes that it is, in fact, a nation and is scarcely conscious any longer of the limitations of the state boundaries. It is on the plea of the need to exercise the power to regulate interstate and foreign commerce that it is proposed that Congress shall erect corporations with power to manufacture goods to be used in trade beyond the borders of a single state, and it is urged that the regulation of commerce may well require the regulation of the incorporated association by which trade is carried on. There is no need to review the arguments in detail. It is enough to collect and quote from these scattered papers while examining the recent decision of the United States Supreme Court on the extent of the power of corporations created by Congress and considering whether it suggests any change in the attitude of the court upon the subject involved. The reversal of the decision of the court below in the Federal Reserve Board case³⁶ was based distinctly upon the

³⁴ 17 MICH. L. REV. 259.

³⁵ *Ibid.*, 77.

³⁶ 244 U. S. 416, 425 (1917).

assertion that it departed from the rule laid down in *M'Culloch v. Maryland* and *Osborn v. Bank of the United States*.

"What those cases established,"

said the Chief Justice,

"was that although a business was of a private nature and subject to state regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank power to exercise such private business in coöperation with or as a part of its public authority."

The court below had found that the new functions were quite different from those of a bank, but the Chief Justice said that under present conditions they were, in fact, incidental to the business of banks as now conducted by rival state banks, and therefore might well have been found by Congress to be essential to the efficiency of the national banks. The court below, he said, had erred in not regarding the corporation as an entity and in regarding the new functions as segregated. This does not imply that whatever functions might be given to the corporations created by Congress they could lawfully be exercised, but only, as the Chief Justice himself explains, that any particular functions must be considered as component parts of the operations of the bank as an entity, and by this it is clear that he meant its operation as a means of carrying into execution the powers conferred by the Constitution upon Congress.

Chief Justice Marshall, in *Osborn v. Bank of the United States*,³⁷ said:

"The constitutional power of Congress to create a bank, is derived altogether from the necessity of such an institution for the fiscal purposes of the Union. It is established, not for the benefit of the stock-holders, but for the benefit of the nation. It is a part of the fiscal means of the nation. Indeed, 'the power of creating a corporation is never used for its own sake, but for the purpose of effecting something else.'³⁸ All its powers and faculties are conferred for this purpose and for this alone, and it is to be supposed that no other or greater powers are conferred than are necessary to this end."

³⁷ 9 Wheat. (U. S.) 738, 809, 810 (1824).

³⁸ *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316, 411 (1819).

The Supreme Court in the case on the powers conferred on national banks by the Reserve Board³⁹ suggests no modification of this ruling. It makes the doctrine of this case the basis of its decision, and says:

"The ruling in effect was that although a particular character of business might not be when isolatedly considered within the implied power of Congress, if such business was appropriate or relevant to the banking business the implied power was to be tested by the right to create the bank and the authority to attach to it that which was relevant in the judgment of Congress to make the business of the bank successful."

Whether the functions attached to the corporation are appropriate or relevant must be determined by Congress in view of the need of fitting the corporation to carry into execution the powers committed to Congress. There is no question of the power of Congress to create corporations as a means to carry out its constitutional powers. The only question is as to the limitation upon the powers that may be conferred upon and the powers that may be exercised by the corporation. The limitation is not upon the power to create corporations, but only upon the purposes for which the corporation may be used as an appropriate means.

Congress may authorize the formation of corporations for any of the purposes enumerated in the constitution as within its jurisdiction. It may create them for carrying into execution its fiscal operations, its power to raise and transport armies, to declare and carry on war, to regulate commerce between foreign nations or among the states, and having created them for any of these purposes it may incidentally and in its discretion confer upon them other powers relevant and appropriate to make them efficient instruments of the government for its own purposes; and just at this point comes the question what other powers are relevant and appropriate and what is the character and extent of the efficiency and what, if any, is the limit of the discretion the courts will allow to the Congress in these matters.

The Supreme Court, in *First National Bank v. Union Trust Co.*,⁴⁰ lays emphasis upon the right of Congress to exercise its legislative judgment as to the necessity for creating the bank, including the scope and character of the public and private powers

³⁹ 244 U. S. 416, 420 (1917).

⁴⁰ 244 U. S. 416 (1917).

which should be given to it, and says that in that case the discretion of Congress was disregarded and judicial discretion put in its place, but the fact remains that the powers of Congress are enumerated and limited, and the creation of a corporation is not in itself one of the enumerated powers, but only a means of exercising one or more of those powers, and it seems to be clear that Congress, by adopting a corporation as a means, cannot thereby acquire power to do anything which under the constitution is beyond the sphere of its authority and therefore reserved to the states.

It is within the sphere of the power to regulate commerce that there is the greatest latitude for the exercise of the discretion of Congress as to what is appropriate and relevant for making a corporation efficient for exercising the powers given to it with a view to carrying this power into execution.

I shall not attempt to discuss the question whether or to what extent Congress may authorize transportation or trading companies to manufacture goods to be used in interstate or foreign commerce. It may well be that even more general powers will be claimed to be necessary for the successful operation of federal corporations organized for the development of American trade with foreign countries.

It is important to consider that corporations created by Congress will have certain advantages over corporations organized under state laws. They will not be foreign corporations which may be excluded from doing business in the states or be subject to regulation. They will not be on a par with corporations organized by Congress in the territories or the District of Columbia: being organized under an act of Congress their rights are derived from the laws of the United States. In *Osborn v. Bank of the United States*⁴¹ Chief Justice Marshall, speaking of the bank, said: "It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?" and it was settled in that case that a suit by or against a corporation chartered by the United States is one arising under a law of the United States and subject to the jurisdiction of the United States courts without regard to difference of citizenship. So also

⁴¹ 9 Wheat. (U. S.) 738, 823 (1824).

in the Pacific Railroad Removal cases⁴² it was held, on the authority of the case of the United States Bank, that corporations of the United States are entitled to remove suits brought against them in the state courts under the Removal of Causes Act of March 3, 1875,⁴³ on the ground that such suits are "suits arising under the laws of the United States," and this ruling has been followed and applied in a long line of cases, save when the particular suit was withdrawn or excluded from the federal jurisdiction by some specific enactment, as in the case of national banks or railroads.⁴⁴ Similar statutes would have the same effect upon suits by or against other corporations incorporated by Congress. Provision might be made that suits should be brought against them in the state courts, or that such suits should not be removed merely because the corporation was created by act of Congress.

Corporations created by Congress are not, unless by statute, as in the case of the national banks, citizens for jurisdictional purposes of the state wherein they reside, nor citizens of the United States under the Fourteenth Amendment.⁴⁵

Within the scope of the powers conferred upon Congress, the powers conferred upon the corporations created by Congress are protected by the laws and constitution of the United States, and these are paramount and must prevail.⁴⁶ "Within the scope of its powers, as enumerated and defined, it (the government of the United States) is supreme and above the States; but beyond, it has no existence."⁴⁷

There is a division of sovereignty within the territory of the several states which is also the territory of the United States. The powers given by Congress to the corporations created by it are the powers which emanate from the sovereignty of the United States and not from that of the states.⁴⁸ It is not merely a question of filing the certificate of incorporation in Washington or Boston.

⁴² 115 U. S. 1 (1885). ⁴³ 18 STAT. AT L. 470 (1875).

⁴⁴ *Bankers' Trust Co. v. Texas & Pacific Ry. Co.*, 241 U. S. 295 (1916). 22 STAT. AT L. 162 (1882), chap. 290, § 4; 38 STAT. AT L. 804 (1915), chap. 22, § 5.

⁴⁵ *Bankers' Trust Co. v. Texas & Pacific Ry. Co.*, 241 U. S. 295 (1916).

⁴⁶ *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316 (1819); *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 414 (1821); *Osborn v. Bank of the United States*, 9 Wheat. (U. S.) 738. *In re Quarles and Butler*, 158 U. S. 532, 536 (1895).

⁴⁷ *United States v. Cruikshank*, 92 U. S. 542, 550 (1875). See also *Brennan v. Titusville*, 153 U. S. 289 (1894).

⁴⁸ 1 THOMPSON ON CORPORATIONS, § 675 (1895 ed.).

The charter or certificate of the corporation does not merely create the corporation but also endows it with all the powers and faculties which it possesses.⁴⁹

The right to tax the franchises of a corporation created by Congress belongs to Congress alone. As Justice Bradley said in a case on a state tax upon the Pacific Railroad Company,⁵⁰ "No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise;" and it was held in this case and a long line of cases that no franchise granted by Congress can be subject to taxation without the consent of Congress. It was the question of the right to tax the Bank of the United States that was the subject of the controversy over the right of Congress to incorporate the bank and the extent of its incidental powers, and controversies with regard to federal and state taxation will arise when corporations created by Congress exercise powers that may not constitutionally be conferred upon them by Congress.

Aside from the national banks acts and acts relating to the District of Columbia, there are, I believe, no general acts of Congress providing for the organization of corporations. Bills for that purpose were introduced on November 9, 1903, and February 7, 1910. The objects for which such corporations might be formed would have to be distinctly limited to those that are appropriate and relevant to carrying out the powers conferred upon Congress, and such as in the judgment of Congress are incidental to assuring the efficiency of the corporations for those purposes. General railroad laws for interstate lines might easily be drafted, and if Congress should determine that the proper regulation of interstate or foreign commerce required it, provision might be made by general law for incorporation of companies for that purpose; but it must be remembered that such companies so formed would not be merely so many companies additional to those now existing. They would be companies created by a different sovereignty, and so far as they acted within their powers they would not be subject to the control of the sovereignty of the state. In view of the decision of the United States Supreme Court that the business of insurance companies is not interstate commerce, such companies could not be

⁴⁹ *Osborn v. Bank of the United States*, 9 Wheat. (U. S.) 738 (1824).

⁵⁰ *California v. Pacific R. R. Co.*, 127 U. S. 1, 40 (1887).

incorporated under acts of Congress.⁵¹ Congress could by general laws provide for the incorporation of companies as means for carrying into execution the powers conferred upon Congress, but it could not permit them to include among the objects the transaction of all lawful business.

The question what business is lawful business for companies created by Congress must be determined in each class of cases by reference to the powers conferred upon Congress. The question is a question of the power of the corporation, and it would seem that it would constitute a question involving the application of the doctrine of *ultra vires*. That doctrine depends upon the extent of the power given to a corporation by the legislature, and in the case of federal corporations this depends upon the power possessed by Congress with regard to the objects for which the corporation is formed and the incidental powers which exist by implication. This doctrine, however, is usually invoked in cases involving the private rights of persons dealing with the corporations.

There would seem to be no doubt but that the question of the power of the corporation might be challenged by the Attorney-General of the United States. In the recent case in the Supreme Court relating to the powers conferred upon national banks the court declared that the action was properly brought by the state Attorney-General, but only on the ground that the statute made it a condition that the particular functions in question were given "only when not in contravention of state or local laws."

Mr. Justice Vandeventer dissented on the ground that this was not sufficient reason for permitting the state court to take jurisdiction of a suit relating to a power or franchise conferred by act of Congress. It is undoubtedly true that in the absence of such a limitation in the act creating the corporation, any suit to determine the question what powers the corporation may exercise would be a suit arising under the Constitution and laws of the United States.⁵²

In such a case the question would not be whether Congress has or has not the right to create a corporation. Of this there is no question. The right to create a corporation is not one of the sub-

⁵¹ *Paul v. Virginia*, 8 Wall. (U. S.) 168 (1868); *Hooper v. California*, 155 U. S. 648 (1895); *New York Life Ins. Co. v. Cravens*, 178 U. S. 389 (1900).

⁵² *Osborn v. Bank of the United States*, 9 Wheat. (U. S.) 738, 823-25 (1824).

stantive powers conferred upon Congress, but it is one of the ordinary incidents of sovereignty and it is one of the means which Congress may employ for the purpose of carrying into effect any of the powers vested in the government of the United States. A corporation so created is, in a broader or a narrower sense, an instrument of the government. Chief Justice Marshall, in speaking of the United States Bank, said

"it was not considered as a private corporation whose principal object is individual trade and individual profit, but as a public corporation created for public and national purposes." And again, "It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation."⁵³

The idea of a public corporation attaches also to the interstate railroad company and telegraph company which are themselves instruments of interstate commerce; but it is more difficult to connect it very closely with corporations that are created to carry on business in interstate commerce the regulation of which is quite independent of the fact of incorporation; but in all cases in which the United States creates a corporation for executing any of its powers, the primary purpose is the execution of the powers of Congress, and whatever incidental powers the corporations may have are powers which are applied because they are relevant and appropriate to making it efficient as an instrument for carrying those powers into effect.

The decision in the recent case of the *First National Bank v. Union Trust Co.*⁵⁴ has not modified the principles laid down by Chief Justice Marshall in the cases of the United States Bank. The court laid stress upon the fact that Congress must have wide discretion and that this discretion must be exercised by Congress rather than by the court, and that in judging the powers you must take the corporation as an entity and consider the particular functions as connected with the operation of the corporation as a whole for the purposes for which it was created; but it did not intimate that once the corporation was created for a federal purpose it was capable of doing anything that might be done by a corpora-

⁵³ *Osborn v. Bank (U. S.)*, 9 Wheat. (U. S.) 738, 860 (1824).

⁵⁴ 244 U. S. 416 (1917).

tion created by any sovereign power. There was nothing to suggest that the power of the corporation was not limited to the sphere of the sovereignty exercised by the government of the United States within the several states of the Union.

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